

FAMILY MEDICAL LEAVE ACT

FAQs May 2010

Eligibility

Q: How long does an employee have to work for the employer before they are eligible for FMLA?

A: The employee must have been employed by the employer for at least 12 months (does not need to be consecutive) and worked for at least 1250 hours in the immediately preceding 12 months.

Q: If I have to miss work due to National Guard or Reserve duty, will this affect my eligibility for FMLA leave?

A: No. The regulations make clear the protections for our men and women serving in the military by stating that a break in service due to an employee's fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1250 hours of service. Under USERRA (Uniformed Services Employment and Reemployment Rights Act of 1994), hours that an employee would have worked but for his or her military service are credited toward the employee's required 1,250 hours worked for FMLA eligibility. Similarly, the time in military service also must be counted in determining whether the employee has been employed at least 12 months by the employer.

Q: Are student employees covered under the FMLA?

A: If they are being paid they are covered. However they may not meet the 12 month/1250 hour requirement. If they meet the eligibility requirements they would be covered.

Qualifying Reasons for FMLA Leave

Q: What qualifies for FMLA protection?

A: (1) Birth of a child and to care for the newborn child;
(2) Placement with the employee of a child for adoption or foster care;
(3) Care for the employee's spouse, child, or parent with a serious health condition;
(4) Serious health condition that makes the employee unable to perform the functions of the employee's job;

- (5) Qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a covered military member on active duty, or has been notified of an impending call or order to active duty;
- (6) Care for a covered service member with a serious injury or illness if the employee is the Spouse, child, parent, or next of kin of the service member.

Q: Can I use FMLA leave during pregnancy or after the birth of a child?

A: Yes. Under the regulations, a mother can use 12 weeks of FMLA leave for the birth of a Child, for prenatal care and incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can use 12 weeks of FMLA leave for the birth of a child and to care for his spouse who is incapacitated due to the pregnancy or child birth.

Q: Can the mother and father each use 12 weeks of FMLA leave for the birth of a child?

A: Yes. However, if the mother and father are employed by the same employer (agency), the regulations state that the FMLA leave may be the combined leave for both mother and father equaling 12 weeks.

Q: What is a "serious health condition"?

A: A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. The "continuing treatment" means: (1) a period of incapacity of more than 3 consecutive, full calendar days plus treatment by a health care provider twice, or once with a continuing regimen of treatment, (2) any period of incapacity related to pregnancy or prenatal care, (3) any period of incapacity or treatment for a chronic serious health condition, (4) a period of incapacity for permanent or long-term conditions for which treatment may not be effective, or (5) any period of incapacity to receive multiple treatments (including recovery from those treatments) for restorative surgery, or for a condition which would likely result in an incapacity of more than 3 consecutive, full calendar days.

Q: Are chronic serious health conditions covered?

A: Yes. The regulations define a chronic serious health condition as one that

- (1) Requires "periodic visits" for treatment by a health care provider or nurse under the Supervision of the health care provider,
- (2) continues over an extended period of time, and
- (3) may cause episodic rather than continuing periods of incapacity. The regulations define "periodic visits" as at least twice a year.

Q: Who is considered a child?

A: For the purposes of FMLA, a child means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under the age of 18 or age 18 or older and incapable of self care because of a mental or physical disability in accordance with the ADA, at the time the FMLA leave is to commence. The FMLA interprets “loco parentis” very broadly. The employee would not have to have official, legal documents to establish loco parentis. The employee would just have to establish that the child is living in their household. Examples could include: grandparents taking care of their grandchild; same sex partner taking care of adopted child; stepparents.

Q: If a wife’s father becomes ill and needs care that is covered under the FMLA, can the husband take FMLA to help take care of his father-in-law?

A: No. The law applies only to direct family members, not to in-laws.

Q: Can an employee have FMLA coverage for multiple claims for different qualifying events?

A: An employee is allowed 12 weeks of FMLA protected leave in a 12 month time period. An employee could be covered for multiple claims as long as the total FMLA coverage does not exceed 12 weeks in a 12 month period and the employee has worked 1250 hours in the preceding 12 months of the request.

Employer Notification

Q: Must an employer provide general information to their employees?

A: Yes. Employers must post a general notice explaining the FMLA’s provisions and providing information regarding procedures for filing a claim under the Act in a conspicuous place where it can be seen by employees and applicants.

Q: How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?

A: Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within 5 business days of the employee requesting leave or the employer learning that an employee’s leave may be for a FMLA qualifying reason.

Q: Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?

A: At the same time an employer provides an employee notice of the employee's eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee that they will be required to provide certification of the FMLA qualifying reason for leave and that the employee will be required to use paid leave during FMLA absences unless no leave is available, the FMLA leave will be unpaid. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.

Q: How soon after an employee provides notice of the need for leave must an employer notify an employee that the leave will be designated and counted as FMLA leave?

A: Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within 5 business days of learning that the leave is being taken for an FMLA qualifying reason, absent extenuating circumstances. The designation notice must also state whether paid leave will be substituted for unpaid FMLA leave and whether the employer will require the employee to provide a fitness-for-duty certification to return to work.

Q: If an employer fails to tell an employee that leave has been designated as FMLA leave, can the employer count the leave against the employee's FMLA leave entitlement?

A: Under the regulations, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave and must notify the employee of the designation. Caution: The employer may be liable if the employee can show that he or she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA protected.

Employee Notice Requirements

Q: How much notice must an employee give before taking FMLA leave?

A: When the need for leave is foreseeable based on an expected birth, placement of adoption or foster care, or planned medical treatment, an employee must give at least 30 days notice. If 30 days notice is not possible, an employee is required to provide notice "as soon as practicable". Employees must also provide notice as soon as practicable for foreseeable leave due to a qualifying exigency, regardless of how far in advance such leave is foreseeable either the same day or the next business day upon receiving notice. In all cases, however, the determination of when an employee could practicably provide notice must account for the individual facts and circumstances.

When the leave is unforeseeable, employees are required to provide notice as soon as practicable under the facts and circumstances of the particular case, which the regulations clarify will generally be within the time prescribed by the employer's usual and customary notice requirements applicable to the leave.

Q: What information must an employee give when providing notice of the need for FMLA leave?

A: When an employee seeks leave for the first time for a FMLA qualifying reason, the employee does not to specifically assert his or her rights under FMLA, or even mention FMLA. The employee must, however, provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

Depending on the situation, "sufficient information" may include information that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty and that the requested leave is for a qualifying exigency; if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered service member with a serious injury or illness; and the anticipated duration of the absence if known.

Q: Is an employee required to follow an employer's normal call-in procedures when taking FMLA leave?

A: Yes. Under the regulations, an employee must comply with an employer's call-in procedures unless unusual circumstances prevent the employee from doing so (in which case the employee must provide notice as soon as he or she can practicably do so). The regulations make it clear that, if an employee fails to provide timely notice, he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide.

FMLA Certification

Q: Do I have to give my employer my medical records for leave due to a serious health condition?

A: No. An employee is not required to give the employer his or her medical records. However, the employer does have a statutory right to request that an employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

Q: How soon after I request leave does my employer have to request a medical certification of a serious health condition?

A: Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within 5 business days. If the leave is unforeseen, the employer should request medical certification within 5 days after the leave begins.

Q: Are there specific certification forms that must be used?

A: Yes. State agencies should use the US Department of Labor FMLA forms. A list of those forms may be found in DPS Bulletin No. 09-03 and at the DOL website: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

Q: How long does the employee have to return the completed certification?

A: Under normal circumstances, the employee will have 15 calendar days to return the completed certification. If there are extenuating circumstances that would prevent the return of the complete certification in that time frame, the employee should consult with the employer about the reasons.

Q: What happens if the employee does not provide the employer with the certification within the 15 days?

A: The employer should contact the employee in writing stating the certification had not been received within the 15 days and give the employee 7 more calendar days to provide the certification. If the employee does not provide the certification, the employer can deny that specific request and the employee would not have FMLA protection dating back from the date when FMLA was first requested.

Q: What if an employee makes a subsequent request for FMLA after being denied FMLA coverage for untimeliness or failure to provide certification?

A: If the employee makes a subsequent request (even for the same medical issue), the employer should take the same notification steps as if it were a new request. If the employee provides the certification within at least the 15 day time period and the medical condition meets the FMLA requirements, the FMLA would be granted forward from the date of the second request.

Q: What happens if my employer says my medical certification is incomplete?

A: An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The regulations require that the employer state in writing what the additional information is necessary to make the certification complete and sufficient. The regulations also require that the employer allow the employee at least 7 calendar days to cure the deficiency, unless 7 days is not practicable under the particular circumstances despite the employee's diligent good faith efforts.

Q: May my employer contact my health care provider about my serious health condition?

A: The regulations clarify that contact between an employer and an employee's health care provider must comply with HIPPA privacy regulations. Contact with the employee's health care provider should be made by the human resource professional or leave administrator who is responsible for managing the FMLA. Under no circumstances should the employee's direct supervisor contact the employee's health care provider. The employee will need to provide their health care provider with a written authorization allowing the health care provider to disclose such information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

Q: Must the employee sign a medical release as part of the medical certification?

A: No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a complete and sufficient to the employer, the employee's request for FMLA leave may be denied.

Q: How often may my employer ask for medical certifications for an on-going serious health condition?

A: The regulations allow recertification no more often than every 30 days in connection with an absence by the employee unless the condition will last for more than 30 days. For conditions that are certified as having a minimum duration of more than 30 days, the employer must wait to request a recertification until the specified period has passed, except that in all cases the employer may request recertification every 6 months in connection with an absence by the employee. The regulations also allow an employer to request recertification in less than 30 days if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

Q: Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?

A: Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified the employee that this information will be required and has provided a list of the essential functions. Additionally, the employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which leave was taken.

Q: What happens if you do not submit a requested medical or fitness-for-duty certification?

A: If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave. If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

Q: Can an employee request FMLA certification "just in case" they may have a medical situation arise from a chronic condition, before there is a specific absence?

A: An employee should only request FMLA certification when there is an actual medical situation. A chronic condition requires at least 2 Dr visits in a 12 month period for the specific condition.

Military Coverage

Q: Who is eligible for coverage under the Military components of the FMLA?

A: In order for employees to be eligible for FMLA leave for the military components, the employee must meet the same eligibility criteria as for other FMLA leave. The employee must have worked for the employer for at least 12 months (non-consecutive) and have worked at least 1250 in the preceding 12 months.

Q: What types of military FMLA leave are there?

A: There are two types of military FMLA leave. 1) Exigency Leave 2) Care giver leave.

- 1) Qualifying Exigency: an eligible employee is entitled to up to 12 weeks for any qualifying exigency, arising out of the fact that the spouse, child, or parent of the employee is on active duty in a foreign country, or had been notified of an impending call to active duty status in a foreign country, in support of a contingency operation. This applies to members of the Regular Armed Forces, National Guard or Reserves.
- 2) Care giver leave: an eligible employee who is the spouse, child, parent, or next of kin of a covered service member who is recovering from a serious illness or injury sustained in the line of duty while on active duty in a foreign country, is entitled to up to 26 weeks of leave in a single 12 month period to care for that service member. This applies to members of the Regular Armed Forces, National Guard, Reserves, and certain Veterans. (Eligible veterans are those that are undergoing medical treatment for an injury or illness sustained or aggravated during active military service within 5 years of the date on which the veteran undergoes medical treatment.)

Q: Could an employee have both exigency leave and care giver leave in the same year?

A: Yes. It is possible that an employee could have 12 weeks of exigency leave AND 26 weeks of caregiver leave.

Q: What are considered qualifying exigencies?

A: Issues that arise from the fact that a covered military member is notified of an impending call or order to active duty in a foreign country. This can include military events, child care, family support activities, legal issues, school issues. For details of qualifying exigencies see 29 CFR Part 825.126.

Miscellaneous

Q: If an employee is on FMLA leave, leave without pay, for more than 30 days; does this affect their length of service?

A: No. An employee cannot be harmed or lose employment benefits while on approved FMLA leave. Therefore, if an employee is on FMLA without pay for more than 30 days, their length of service is not interrupted.

Q: Does “light duty” count towards the 12 weeks FMLA protection?

A: No. “Light duty” does not count against the employee’s FMLA leave entitlement. The employee’s right to job restoration is also retained during the light-duty period, but only until the end of the 12 month period that the employer uses to calculate the FMLA leave.

Q: Who qualifies as a “medical provider”?

A: As long as the insurance carrier recognizes and pays for treatment provided by the “medical provider”, that provider would be considered a “medical provider” for FMLA purposes.

Q: If FMLA leave prevents the employee from working overtime hours, are those hours counted toward the 12 weeks of FMLA protection?

A: If the overtime hours are not on a regular basis, the hours not worked due to FMLA would not count against the FMLA entitlement. If the employee’s regular work scheduled included overtime hours, the hours missed would count against the FMLA entitlement.